

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2064

To be Argued by
MARK C. RUTZICK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FREDERIC D. JENNINGS,

Petitioner-Appellant,

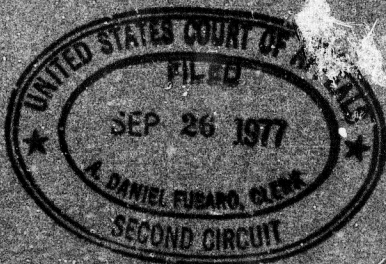
- against -

J. LELAND CASSCLES, Superintendant of
Great Meadow Correctional Facility,
Comstock, New York,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLEE



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BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Hon. Mark A. Constantino, U.S.D.J.) dated November 8, 1976 denying the petition for a writ of habeas corpus. Judge Constantino's decision is reported at 424 F. Supp. 280.

Question Presented

Did the use at trial of petitioner's voluntary confession, given one day after he had made prior voluntary but inadmissible statements which he intended as exculpatory, violate his Fifth Amendment privilege against self-incrimination?

Statement of the Case

On the night of June 4-5, 1970 petitioner-appellant Frederic D. Jennings brutally murdered 14-year old Mary Eloise Carman in a wooded area near her home in Wyandanch, New York. (230-31, 237-37).^{*} As the youngster was returning home from a school chorus concert in which she had sung, (186, 190, 195, 277), the petitioner grabbed her from behind (230) dragged her into the woods (230), ripped her clothing off (286-290) and strangled her to death (231, 236-37). He strangled her in such a manner as not to break any bones in her neck, a skill he later described for the police. (232). After killing the young girl he left her body to rot (550, 558, 526), and the decrepit remains were accidentally discovered by Mary Eloise's father some two and one half months later, on August 21, 1970 (46, 48).

^{*} Numbers in parenthesis refer to the transcript of trial in Suffolk County Court.

At the time the body was discovered, petitioner was in custody in the Suffolk County jail, awaiting trial on two rape charges.* He was questioned by Suffolk County police in the jail and on August 27, 1970 confessed to the murder. That confession was the subject of a pre-trial Huntley hearing (see People v. Huntley, 15 N Y 2d 72 [1965]) and the Petitioner's Brief at pp. 2-7 adequately describes that proceeding. The petitioner did not testify at the Huntley hearing. The only witness was Police Detective Edward Halverson, who was thoroughly cross-examined by defense counsel. (249-71).

Following the Huntley hearing the trial judge (Hon. Ernest L. Signorelli) found that petitioner's statements to the police on both August 26 and August 27 were in fact voluntary and of his own free will. (339). Judge Signorelli also found, however, that petitioner should have been given Miranda warnings prior to the questioning on August 26 (340) and held that because of the failure to give him those warnings on that day, his statements on that day were inadmissible. (345).

* He was convicted of both charges and is currently serving fifteen year prison sentences for both crimes, running concurrently with the sentence for the conviction he is challenging herein.

The trial judge held that the confession and other statements made on August 27 after the Miranda warnings were given were "admissible since defendant was adequately advised on that occasion and . . . he intelligently and knowingly waived his constitutional rights to counsel and to remain silent." (345-46). Based on his confession and other statements of August 27, together with evidence concerning the manner and circumstances of Mary Eloise's death, petitioner was convicted of murder by a jury and sentenced to a prison term of 25 years to life.

The Appellate Division unanimously affirmed the conviction. 40 A D 2d 357 (Second Dept., 1973). After examining the entire trial record, the Court categorically rejected the claim petitioner raises herein. The Court held:

"In essence the defendant argues that the confession obtained after the delivery of the Miranda warnings came about because of the statements he made the day before without any such warnings. The circumstances here do not sustain that claim. Nothing in this record remotely suggests that any of the statements made on either occasion were made involuntarily. There is no showing that the earlier admissions so dominated the defendant's mind on the later occasion that he was compelled to speak. . . .

"The question, therefore, is not whether, as the defendant urges, the falsity of the first statement made without Miranda warnings led to the second made following Miranda warnings. Unquestionably, suspicion centered on the defendant when the falsity of his story became known. The true question, on the other hand, is whether on either occasion the statements were involuntary by reason of coercion, deception or other pernicious conduct on the part of the police (Cf. People v. Tanner, 30 N Y 2d 102, 106).

"On this record as we read it, there is no evidence of oppressive tactics used against the defendant. When he incriminated himself, he did so only after proper warnings and without improper inducements. The confession was therefore correctly admitted into evidence." 40 A D 2d 357, 362-63.

The New York Court of Appeals affirmed the conviction on the opinion of the Appellate Division. 33 N Y 2d 880 (1973).

Following the affirmance by the New York Court of Appeals, petitioner filed a pro se petition for a writ of habeas corpus asserting that his confession was the "fruit of the poisonous tree" of the inadmissible statements of August 26 and should have been suppressed, and asserting an insufficiency of proof of the crime of murder at his trial. The petition was denied (Dec. 4).^{*} Petitioner then filed the instant petition

* The numbers "Dec." in parentheses refer to pages of Judge Constantino's decision as reproduced in the Appendix.

with the assistance of counsel alleging 1) that his confession was involuntary in fact and 2) that the confession should have been suppressed in any event as the "fruit of the poisonous tree." The petition was denied by Judge Constantino, who held 1) that the state court's determination at the Huntley hearing that the confession was in fact voluntary must be upheld in accordance with 28 U.S.C. § 2254(d) (Dec. 9) and 2) even if the "fruit of the poisonous tree" doctrine applied to the facts of this case, the voluntariness of the statements and confession given August 27 "constituted an intervening act of free will sufficient to purge the primary taint so as to render the confession admissible." (Dec. 11).

POINT I

PETITIONER APPARENTLY NOW CONCEDES
THAT HIS CONFESSION WAS IN FACT
VOLUNTARY.

An examination of petitioner's brief to this Court indicates that he has apparently abandoned the claim raised below that his confession was in fact involuntary. Though the abandonment of this claim is not announced, petitioner nowhere addresses that claim in the brief and in fact does not even refer to it. This omission must constitute an abandonment, and respondent regards it as such.

This abandonment was, surely, dictated by the inevitability that this Court would have to find the confession voluntary, as did Judge Constantino. This Court held most recently in Tanner v. Vincent, 541 F. 2d 932, 937 (2d Cir. 1976) cert. den. ____ U.S. ____ (1977), a case virtually identical to the case at bar, that the federal courts in a habeas corpus proceeding must accept the findings of the state court at a Huntley hearing as presumptively correct under 28 U.S.C. § 2254(d). See LaVallee v. Delle Rose, 410 U.S. 690 (1973) (per curiam). The petitioner does not allege that the Huntley hearing was deficient in any way, and thus would have to bear the burden of showing by convincing evidence that the findings of fact by the state court were erroneous. Tanner v. Vincent, supra at 937. Yet petitioner has neither challenged those findings nor suggested any additional evidence to be considered. He merely disagreed with the finding of voluntariness (but apparently no longer does). Since petitioner himself did not testify at the Huntley hearing, though he could have with impunity, there was not even any dispute between witnesses for the hearing judge to resolve, and petitioner's failure to testify permits an inference against him. In the

absence of any colorable argument why the Huntley hearing findings were incorrect, this Court would be required to accept those findings as correct.*

In this case there is even more reason to accept those findings, because a five-judge panel of the Appellate Division reviewed the trial record (including the Huntley hearing) and explicitly agreed with the finding of voluntariness by the trial judge. 40 A D 2d 357, 362-63. The New York Court of Appeals then accepted an appeal of the conviction and affirmed it on the opinion of the Appellate Division. 33 N Y 2d 880, 881 (1973). Thus in total thirteen New York judges have found petitioner's confession to be voluntary. That is a reliable finding and 28 U.S.C. § 2254(d) would require this Court to accept it as correct.

Further, Judge Constantino indicated that this review of the state court record also produced a finding that petitioner's confession was voluntary. He stated, "[e]ven if it were proper for this Court to review the state

* As the Court pointed out in Tanner v. Vincent, supra, at 937, n. 6, petitioner actually enjoyed a higher standard of protection at the Huntley hearing than is constitutionality mandated, since People v. Huntley, 15 N Y 2d 72, 78, requires a finding of voluntariness beyond a reasonable doubt, and the Constitution only requires a finding of voluntariness by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1972).

state court's finding as to voluntariness in this case, however, that finding would not be disturbed." Dec. 7-8. Thus even without benefit of 28 U.S.C. § 2254(d), the finding of voluntariness would stand unless shown to be clearly erroneous. Petitioner has made no such showing, and apparently does not seek to do so.

POINT II

SINCE PETITIONER'S CONFESSION ON AUGUST 27 WAS VOLUNTARY, IT WAS NOT THE "FRUIT" OF HIS VOLUNTARY BUT INADMISSIBLE STATEMENTS OF AUGUST 26 AND WAS THEREFORE ADMISSIBLE AT TRIAL.

Petitioner has both misread and misunderstood the decision below, and thus has failed to grasp the essential holding of the District Court. Judge Constantino did not, contrary to petitioner's assertion at p. 10 of his brief, find that the giving of the Miranda warnings per se rendered the subsequent confession admissible. Quite the opposite, he recognized that under Brown v. Illinois, 422 U.S. 590 (1975) such a finding was incorrect. Dec. 10. Rather, Judge Constantino held that since the confession made on August 27 was in fact voluntary, as found by the state trial judge at the Huntley hearing, it was not causally connected to the voluntary but inadmissible statements made August 26 but was "an intervening act of free will", Dec. 11. In sum, Judge

Constantino held that "the petitioner's confession was neither involuntary nor the fruit of the poisonous tree." Dec. 11. Since the confession was not the "fruit of the poisonous tree" neither that Court nor this Court is called upon to decide if that particular analytical approach is appropriate to this kind of case. Thus, the petitioner's prolonged discussion of the factors informing that decision is irrelevant.

In effect this case is a carbon copy of Tanner v. Vincent, supra and that case requires affirmance of the decision below. In both cases a prior statement was made voluntarily but was suppressed because of a failure by police to render proper Miranda warnings (in this case none at all were rendered). In both cases the state hearing judge found the later confession was voluntary, based upon an intelligent and knowing waiver of the right to remain silent, and not compelled by any force including force of prior statements. In Tanner the Court reaffirmed that "voluntariness is the touchstone of admissibility under the Fifth Amendment and "adhere[d] to the established rule that the voluntariness of any custodial statement must be determined from an examination of the totality of particular facts surrounding its making." Tanner v. Vincent, supra, at 936.

That "voluntariness" is the key to Fifth Amendment admissibility has been long established. See Clewis v. Texas, 386 U.S. 707, 708 (1967); Lyons v. Oklahoma, 322 U.S. 596, 603 (1944); Myers v. Frye, 401 F. 2d 18, 22 (7th Cir. 1968). This principle was reaffirmed in Miranda itself. After setting out the now-famous list of warnings to be administered defendants upon arrest, the Supreme Court observed that "[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." Miranda v. Arizona, 384 U.S. 436, 444 (1966). See Brewer v. Williams, ____ U.S. ____, 51 L.Ed 2d 424 (1977). And in Westover v. United States, the companion case to Miranda involving an unwarned confession to local police followed by a confession to the F.B.I. after proper Miranda-type warnings, the Court found the confession to the F.B.I. inadmissible because "[o]n the facts of this case we cannot find that Westover knowingly and intelligently waived his right to remain silent and his right to consult with counsel prior to the time he made the statement." 384 U.S. at 495 (emphasis supplied).

Thus both Miranda and Westover showed that a voluntary, knowing and intelligent waiver of the right to remain silent, notwithstanding prior statements, is sufficient to permit use of a confession. Had Westover's confession truly been voluntary, it cannot be doubted that the Supreme Court would have permitted its use, even after the prior unwarned

confession. This Court so held as to Tanner's confess. in Tanner v. Vincent, supra, and it must so hold in this case as well.

Petitioner, however, has lost sight of this fundamental principle, and has sought to graft the Fourth Amendment exclusionary rule analysis of Brown v. Illinois, 422 U.S. 590 (1975), onto the Fifth Amendment. Yet the Supreme Court in Brown made it quite clear that it was limiting its analysis to situations where a Fourth Amendment violation leads to a confession. The great difference between the purposes of the two amendments led the Court to hold that a confession which is voluntary and thus admissible under the Fifth Amendment may nonetheless be excluded in order to invigorate the Fourth Amendment. It held:

"Thus, even if the statement in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, Wong Sun [v. United States, 371 U.S. 471 (1963)] requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.' . . . Wong Sun thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment." Brown v. Illinois, supra at 601-02 (emphasis supplied).

It seems abundantly clear that the Supreme Court's multifactor test in Brown for the admissibility of a confession given following a Fourth Amendment violation (see 422 U.S. at 603-04) is irrelevant where no Fourth Amendment violation has occurred. Yet that is the test petitioner asks this Court to adopt in this case.*

The grounds for distinction between Fourth and Fifth Amendment analysis are sound. The Court in Brown v. Illinois, supra believed that use of a properly-warned confession after an arrest made in violation of the Fourth Amendment should be restricted, since clearly the confession would not have been given had the illegal arrest not have occurred, and the effect of the Fourth Amendment violation could not be discounted without additional safeguards. In the Fifth Amendment context, however, the "voluntariness" test alone is sufficient to discount the effect of any prior Fifth Amendment violation (or violation of Miranda rights). If a confession is found to be voluntary, that is a finding that is not motivated or tainted by previous inadmissible statements. No safeguard beyond a finding of voluntariness is necessary to assure against improper use of inadmissible statements. See United States v. Jobin, 535 F. 2d 145 (1 Cir. 1976).

* It is little wonder that petitioner should try to shift emphasis to that test, which considers the actions of the police rather than the defendant. Petitioner is, after all, trying to avoid the effect of what he no longer denies is a voluntary confession to the vicious murder of a fourteen year old girl. Nor does petitioner even make a semblance of asserting his innocence herein. Rather, the petitioner would ask the Court to conclude that the actions of the police in this case were so oppressive as to justify the release of a self-confessed cold-blooded murderer. Yet the guilt or innocence of a petitioning prisoner should not be irrelevant to the outcome of the proceeding. See Stone v. Powell, 428 U.S. 465, 490 (1976).

Nor does Michigan v. Tucker, 417 U.S. 433 (1974), suggest any departure from the traditional Fifth Amendment "voluntariness" test of admissibility. In that case a statement made without proper Miranda warnings led to the discovery of a witness whose testimony helped convict the defendant. The issue was whether the third party could testify; the case did not raise the question of the circumstances in which the defendant's own properly-warned confession could be admitted when it followed an unwarned confession. Since the witness in Tucker admittedly was found through his unwarned statements, there was no possibility of any "intervening act of free will" by Tucker to legitimize the witness' testimony. The Court's suggestion that in a "proper case" an exclusionary rule might bar evidence derived from a Fifth Amendment violation, Id. at 447, was only addressed to evidence, such as the third-party testimony in that case, which had a direct nexus to the violation and was not within the control of the defendant. The Court in Tucker had no occasion to even suggest that an exclusionary rule would ever properly be applied to exclude a concededly voluntary properly-warned statement by the defendant himself. The Supreme Court would not have announced a departure from the 50-year old basic Fifth Amendment test of voluntariness of confessions in such a cryptic, casual and inferential manner.

The Court in Michigan v. Tucker, supra, made another observation which is significant to this case. The Court held that the Miranda warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." Id. at 444. Thus, "a failure to give an accused a Miranda warning does not deprive him of a constitutional right." United States ex rel. Hudson v. Cannon, 529 F. 2d 890, 894 (7 Cir. 1976).

It must be stressed, therefore, that no constitutional right of the defendant was violated by the police in their questioning of him on August 26. True, the Miranda warnings were not given, but the trial judge at the Huntley hearing specifically found that all of petitioner's statements to the police were in fact voluntary, which includes those made on August 26 (339-40). His Fifth Amendment privilege against self-incrimination was at no time impaired or violated. This of course is another similarity between this case and Tanner v. Vincent, supra. See Knott v. Howard, 511 F. 2d 1060 (1 Cir. 1975).

The application of an exclusionary rule to bar a concededly voluntary confession thus seems completely inappropriate in this case. This conclusion is reinforced by the Supreme Court's analysis in Stone v. Powell, 428 U.S. 465 (1976).

A voluntary confession is every bit as reliable and probative as the real evidence seized by the police in Stone, and the exclusion of a voluntary confession deflects the truth finding process as much as the exclusion of real evidence. See Stone v. Powell, supra at 490. And since encouraging respect for constitutional rights is an important underpinning of the exclusionary rule, Id. at 492, where -- as here -- no constitutional right but only a prophylactic measure has been encroached, application of an exclusionary rule is insupportable. Further, this is a habeas corpus proceeding, and Stone v. Powell teaches that even if an exclusionary rule were justified in the state courts, it should not be applied on a habeas corpus petition. Id. at 493.

This case is easily distinguishable from United States ex rel. Stephen J.B. v. Shelly, 430 F. 2d 215 (2 Cir. 1970), on the same grounds as was Tanner v. Vincent, supra. In Stephen the District Court granted the writ for the reason that it found as a matter of fact that the 16-year old youngster's confessions to the police following the Miranda warnings were not voluntary, and that his waiver of his Fifth Amendment rights was not intelligent and voluntary. Id. at 218. The possibility that young Stephen felt he had "let the cat out of the bag" by his prior unwarned statements was but one factor to consider in determining the voluntariness of his later confession. United States v. Bayer, 331 U.S. 532, 540 (1947). Other factors were his age, his fatigue and his lack of prior experience with the law. Id. at 218-19; Tanner v. Vincent, supra at 935-36. Further, in that case the District Judge was per-

mitted to make factual findings because 28 U.S.C. § 2254(d) was not raised. Here, as in Tanner, that statute required the District Judge, and this Court, to respect the state court's findings of fact.

Petitioner here stood in far different footing from Stephen J.B. during his questioning by police. He was twenty-two years old and had been arrested at least two times previously (for the rape charges on which he was subsequently convicted). He met with police during business hours (between 10:30 a.m. and 4:30 p.m.) and enjoyed a one-and-one-half hour break for lunch. On both days he signed a permission slip prior to the questioning agreeing to speak to the police. Importantly, he thought his statements on August 26 were exculpatory, and he repeated his story about the fictitious "friend" to police on August 27 even after they gave him the Miranda warnings. (226). Only after the police pointed out inconsistencies in that story did he confess to the murder. (226-36). Thus all the available circumstantial evidence supports the finding of the trial judge that petitioner's statements to police both on August 26 and August 27 were completely voluntary and that the August 27 confession was in no way coerced by any circumstances including his own prior statements. Judge Constantino concurred in that finding. Dec. 7-8.

Nor is there any evidence in the record that the Suffolk County police detectives intentionally violated

petitioner's Miranda rights. Notwithstanding petitioner's vain and belabored effort to portray the police as malevolent wrong-doers, the record indicates that the police failed to administer the Miranda warnings on August 26 only because they in good faith did not regard petitioner as a "suspect" such as to require the warnings. The police had no evidence at that point to connect him to the murder (210) and only questioned him because he lived in the area of the murder, was charged with rape and Mary Eloise probably had been raped. (210, 252). He was one of 30-35 persons interrogated by Detective Halverson, and was only a "general suspect" along with others of that group. (210, 261). The police could reasonably decide that Miranda warnings were not required on August 26 before they had even discussed the crime with petitioner. The record shows that Detective Halverson came to view petitioner as the murderer only in the evening of August 26 after interviewing witnesses who contradicted petitioner's story. (256). The next morning, believing petitioner the murderer, he fully advised him of his rights (256, 345-46). Thus, the record does not establish, and the trial judge did not find, any intention by the police to deprive petitioner of his Miranda rights. This is significant. See Michigan v. Tucker, supra.

Even if the multi-factor test of Brown v. Illinois, supra were to be applied, erroneously in our view, to the facts of this case, it is clear that petitioner's confession would still be admissible. Under the proper test, that solely of voluntariness, the confession is unquestionably admissible, as found by the state trial judge, the Appellate Division, the New York Court of Appeals and Judge Constantino. Whichever approach is proper, petitioner's conviction for the murder of Mary Eloise Carman must stand.

CONCLUSION

THE DECISION OF THE DISTRICT COURT
DENYING THE PETITION FOR WRIT
OF HABEAS CORPUS SHOULD BE AFFIRMED.

Dated: New York, New York
September 22, 1977

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

BERNADETTE MERLINO , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Appellee
herein. On the 26th day of September , 1977 , she
served the annexed upon the following named person :

KENNETH E. DEMARIO
PIERCE, GERETY, JR.
Prisoner's Legal Services of New York
100 Church Street
New York, N.Y.

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that purpose.

Bernadette Merlino

Sworn to before me this
26th day of September , 1977

Mark Anthony
Assistant Attorney General
of the State of New York

